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In The

Supreme Court of the United States

October Term, 1986

No. _____

JAMES L. KINGTON and DON EARNEY,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether jurisdiction exists under 18 U.S.C. § 3731 of an appeal from an order suppressing certain evidence made after the jury had been selected, empaneled and sworn and before any verdict, where the criminal case was not dismissed and no mistrial was declared.

II. Whether a limited waiver by the defendants of a claim of double jeopardy upon the possible empaneling of a second jury following a remand of the government's appeal of the suppression order means the defendants were not "put in jeopardy" as that term is used in the second paragraph of 18 U.S.C. § 3731, and, thus, whether such a waiver can confer jurisdiction where it did not otherwise exist.

III. Whether exclusion of evidence is an available remedy for the government's violation of grand jury subpoena provisions of the Right to Financial Privacy Act, 12 U.S.C. § 3420.

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JAMES L. KINGTON and DON EARNEY,

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v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A, has been reported. *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986). The District Court for the Northern District of Texas entered an Order and issued a Memorandum Opinion granting the defendants' Motion to Suppress. The Order and Memorandum Opinion are reproduced in Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in the above-entitled action on October 3, 1986. A timely petition for rehearing was denied on November 12, 1986. The order denying rehearing is reproduced in Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether jurisdiction exists under 18 U.S.C. § 3731 of an appeal from an order suppressing certain evidence made after the jury had been selected, empaneled and sworn and before any verdict, where the criminal case was not dismissed and no mistrial was declared.

II. Whether a limited waiver by the defendants of a claim of double jeopardy upon the possible empaneling of a second jury following a remand of the government's appeal of the suppression order means the defendants were not "put in jeopardy" as that term is used in the second paragraph of 18 U.S.C. § 3731, and, thus, whether such a waiver can confer jurisdiction where it did not otherwise exist.

III. Whether exclusion of evidence is an available remedy for the government's violation of grand jury subpoena provisions of the Right to Financial Privacy Act, 12 U.S.C. § 3420.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, reproduced in Appendix D and E, respectively, are the Criminal Appeals Act, 18 U.S.C. § 3731, and the Right to Financial Privacy Act, 12 U.S.C. §§ 3413(i), 3417 and 3420.

INTRODUCTION

This case presents several significant issues involving the Criminal Appeals Act and the Right to Financial Privacy Act. This Court has provided some guidance regarding the Criminal Appeals Act which supports the position of Petitioners, but the exact issues involved do not appear to have been briefed and submitted to the Court until this time.

The guidance which the Court has provided consists of footnotes from two cases. *Sanabria v. United States,* 437 U.S. 54, 61 n. 10 (1978); *United States v. Ceccolini,* 435 U.S. 268, 271 n. 1 (1978). These cases indicate that the plain language of the second paragraph of 18 U.S.C. § 3731 should be applied literally rather than construed broadly. Section 3731 allows appeals from suppression orders only if the order is "not made after the defendant has been put in jeopardy and before the verdict."

A conflict, however, has developed among the federal courts of appeals regarding the strict or broad construction of the language in issue. The Fifth Circuit and the Eighth Circuit have construed the language of the second paragraph broadly, in reliance on case analysis of the highly distinctive first paragraph of the statute. *United States v. Kington,* 801 F.2d 733, 735-36 (5th Cir. 1986); *United States v. Harshaw,* 705 F.2d 317, 318-20 (8th Cir. 1983). *See also United States v. Beck,* 483 F.2d 203, 205-07 (3rd Cir. 1973), cert. denied, 414 U.S. 1132 (1974).

The Sixth Circuit, on the other hand, has correctly applied the language of the second paragraph as written in two cases. *United States v. Payner,* 572 F.2d 144, 145 (6th Cir. 1978); *United States v. Lucido,* 517 F.2d 1, 3 (6th Cir. 1975). Other courts of appeals, in more cursory opinions, have likewise indicated that the plain terms of the statute should apply. *United States v. Ember,* 726 F.2d 522, 525 n. 6 (9th Cir. 1984); *United States v. Fatico,* 579 F.2d 707, 710-11 (2d Cir. 1978), aff'd on appeal from remand, 603 F.2d 1053 (2d Cir. 1979), cert denied, 444 U.S. 1073 (1980); *see also United States v. Taylor,* 792 F.2d 1019, 1025 (11th Cir. 1986) (dictum), petition for cert. pending, No. 86-5746.

The two approaches create totally different results. Under a liberal construction, the second paragraph of § 3731 prohibits appeal of suppression orders only if a constitutional analysis of the Jeopardy Clause indicates that the defendant would be subject to actual jeopardy if a second trial occurred. Thus, a waiver of double jeopardy arguably would allow appeal because the defendant could permissibly be tried again. A strict construction, however, requires a technical jeopardy analysis. Under that approach, an order may not be appealed if jeopardy has attached upon the empaneling and swearing of the jury, as occurred in this case.

The legislative history regarding appeals of suppression orders expressly exempts them from broad construction in situations such as those presented in this case. Moreover, Supreme Court opinions of the time established that the phrase "put in jeopardy", which was adopted in the 1970 amendment as to appeals of suppression orders, requires a technical analysis of whether jeopardy has attached, not a constitutional analysis. *United States v. Jorn,* 400 U.S. 470, 474-75 (1971); *United States v. Sisson,* 399 U.S. 267, 302-03 (1970).

The Court of Appeals, in addition to applying the phrase incorrectly on the basis of inapplicable construction rules derived from the first paragraph, also ignored express language prohibiting the appeal. The court disregarded the prohibition against appeals from suppression orders made "before the verdict" by indulging in a legal fiction that the trial, which was suspended for the sole purpose of allowing the appeal, was, by virtue of this suspension, "terminated" by the time the suppression order subsequently was issued in written form. The Court of Appeals also, contrary to settled federal practice, decided that the parties could, by waiver, vest it with jurisdiction.

Finally, the government engaged in a blatant violation of 12 U.S.C. § 3420 in total disregard of protective procedures for obtaining financial records pursuant to a grand jury subpoena. The Fifth Circuit agreed that the government violated the law. However, the Court failed to address the significance of the violation and the grounds on which the violation merited the application of the exclusionary rule.

STATEMENT OF THE CASE

This is a criminal case. The facts relevant to this case are essentially contained in the stipulations made between the government and the defendants. (Tr. 4-6, 21-22) (Salient portions of the hearing transcript are reproduced in Appendix F.) On or about July 5, 1983, the government presented a grand jury subpoena to the Abilene National Bank seeking records of the personal financial transactions of James L. Kington and Don Earney. The grand jury subpoena was returnable to the grand jury on July 12, 1983. Defendants had no notice of the subpoena and gave no permission for the release of their records. The documents subpoenaed were picked up from the bank by federal agents, kept by the government for twenty (20) months and *never* delivered to the

grand jury. Government agents prepared oral summaries of the records for the grand jury.

Defendants Kington and Earney were indicted on February 18, 1985, by a grand jury in the Northern District of Texas. Trial was subsequently set for October 22, 1985. On October 2, and 10, 1985, defendants filed motions to suppress the personal financial records obtained by the government via the grand jury subpoena. No order was made by the district court deferring until after trial a ruling on the motion to suppress, nor did the government request that a ruling be made prior to trial. Rule 12, FED. R. CRIM. P.

On October 21, 1985, a jury was selected, sworn and empaneled. Thereafter, the district court conducted a hearing on defendants' motion to suppress. (Transcript) The hearing concluded on October 23, 1985 with a final ruling by the district judge granting the motion to suppress. (Tr. 148-49)

Prior to this ruling, at the request of the district judge, the defendants made a limited waiver of their claim of double jeopardy upon the empaneling of a possible, future second jury. The waiver was conditional. *If* the government had the right to appeal, *if* it did appeal, and *if* the Court of Appeals reversed the suppression order, then the defendants would waive their claim of double jeopardy resulting from the empaneling of a second jury. (Tr. 146)

After the district judge announced his ruling, he inquired of the government's attorney whether the government desired to continue with the trial or whether it would like to attempt to appeal. The government chose to attempt an appeal. (Tr. 150) The court then excused the jury. (Tr. 151) Three weeks later the district court signed its memorandum opinion and order (Appendix B), which the judge had

advised would mark the beginning of the government's appellate timetable. (Tr. 148) No verdict was ever returned, and the case was not dismissed. (Tr. 149)

On this record the Court of Appeals held:

> It was the judge who waited until after trial had commenced to rule on the government's (sic) pretrial motion, and it was the judge who discharged the jury after obtaining the waiver of jeopardy to permit the government's appeal.
>
> The government appeals from an order entered after the termination of the trial, and it did not interrupt an ongoing trial in making its appeal. We conclude that the government did not appeal from a ruling made "after the defendant was put in jeopardy and before the verdict" within the meaning of § 3731, and the appeal is therefore authorized.

801 F.2d at 736.

Once it found jurisdiction to reach the merits the Court of Appeals reversed the suppression order, holding that suppression was not appropriate for evidence illegally obtained and used in violation of 12 U.S.C. § 3420, but instead that punishment of the government agent by contempt was sufficient to protect the interests served by the Right to Financial Privacy Act. 801 F.2d at 737-38.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Fifth Circuit erroneously interpreted the two jurisdictional requirements of the second paragraph of § 3731, refusing to apply the plain terms of the statute and relying on a highly distinguishable case, *United States v. Harshaw* for a broad construction policy. This policy resulted in the Appeals

Court's erroneous use of a constitutional rather than a technical jeopardy analysis.

The Sixth Circuit, on the other hand, as with other courts of appeals, has applied the language of the statute as written. *United States v. Payner, supra; United States v. Lucido, supra.* Although the analysis of other appeals courts has on occasion been cursory, these opinions do support defendants' analysis which indicates that the plain terms of the statute should apply. *See United States v. Fatico, supra* (Phrase in controversy was applied literally, although court also relied on liberal construction policy which did not appear necessary to the court's decision. Thus, this court appears to take a hybridized approach.); *see also United States v. Taylor, supra* at 1025 (dictum) ("Once jury has been sworn and jeopardy attaches, the government loses its right to appeal an adverse ruling" under § 3731.); *United States v. Ember, supra* at 525 n. 6 (Government conceded it could not appeal order excluding evidence because § 3731 "precludes appeal from an order suppressing evidence entered after jeopardy has attached."); *United States v. Kane,* 646 F.2d 4, 6-7 (1st Cir. 1981) (References in legislative history to liberal construction of § 3731 were determined applicable to "orders terminating prosecutions, not those excluding evidence". *Id.* at 6 n. 1.).

The Eighth Circuit, on the other hand, as did the Fifth Circuit, below, has chosen to ignore the language of the statute in favor of a broad policy favoring government appeals. However, this policy does not include appeals involving suppression orders entered during trial. S. Rep. No. 1296, 91st Cong., 2d Sess. 13, 18 (1970) (referred to hereinafter as "Senate Report"); *cf. United States v. Kane, supra* (Liberal construction policy generally refers to dismissal appeals, not suppression order appeals.).

The statutory language in § 3731 was chosen carefully by a Congress that had just been reproached by the Supreme Court in *United States v. Sisson,* and had been urged by the Court to clarify the Act and to remove unduly limiting terms. 399 U.S. 267, 307 (1970). Congress chose to make *"no change"* with regard to the "present lack of provision for appeal from the granting of a motion to suppress evidence during the trial on the merits, when appeal would involve either the termination or suspension of the ongoing trial." Senate Report, at p. 13. (Emphasis added.)

The meaning of "put in jeopardy", a critical phrase in the language in controversy, was deemed, prior to the 1970 amendments, to signify the time when "the jury had been impaneled, even if the defendant might constitutionally have been retried under the double jeopardy provisions of the Fifth Amendment". *United States v. Jorn,* 400 U.S. 470, 474-75 (1971), citing *United States v. Sisson, supra.* The legislative history also stated:

> The courts, therefore, have been faced with the problem whether the phrase 'put in jeopardy' as used in the Criminal Appeals Act should be read literally, or should be interpreted as applying only to circumstances where the defendant cannot be retried without violating the fifth amendment's double jeopardy clause. Senate Report, at pp. 7-8.

Congress noted that the Supreme Court in *Sisson* adopted the technical jeopardy analysis in applying the phrase. *Id.* A change from technical jeopardy to constitutional jeopardy was incorporated in the amendment with regard to dismissal appeals, but not with regard to appeals of suppression orders.

The first paragraph of § 3731 (appeals of dismissals) states that "no appeal shall lie *where the double jeopardy*

clause of the United States Constitution prohibits further prosecution". (Emphasis added.) This permits appeals where allowed under a constitutional analysis of jeopardy. Analysis of technical jeopardy or empaneling of a jury is not required.

The language of the second paragraph, as to appeals of suppression orders, allows appeals except where "made after the defendant has been *put in jeopardy*. . .". (Emphasis added.) "Put in jeopardy" was deemed in *United States v. Sisson, United States v. Jorn* and the legislative history to mean the empanelment of a jury in a jury trial.

Although Congress, in the legislative history, declared that it would change the meaning of jeopardy as to dismissal appeals, it made no such statement as to appeals of suppression orders. Nor did Congress incorporate by reference into the discussion of suppression orders the discussion of the jeopardy change for dismissals.

Congress also addressed each kind of appeal under separate subheadings in the legislative history, specifying different requirements for each. Among other differences, the time the order is entered is deemed important to jurisdiction in appealing suppression orders but not in appealing dismissals.

To summarize, it is established that "put in jeopardy" refers to the empanelment of a jury in the second paragraph of § 3731. First, there is the variation in language between the jeopardy phrases of the first and second paragraphs. Second, the phrase "put in jeopardy" was acknowledged by the Supreme Court and by Congress as referring to the empanelment of a jury. Third, Congress failed to voice an intent to change the meaning of jeopardy as to suppression orders; it also failed to incorporate by reference the discussion of that topic contained in the analysis of dismissal

appeals. Fourth, the separate subheadings in the legislative history and the different time frameworks applicable to each kind of appeal confirm that each was to be treated differently. Thus, an interpretation applicable to the first paragraph cannot be made applicable to the second paragraph in the absence of evidence that Congress so intended. Certainly, the plain terms of the statute do not support such a result.

II. THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It is settled federal practice that parties cannot waive or stipulate to provide a court with subject jurisdiction. *Ins. Corp. of Ireland v. Compagnie Des Bauxites,* 456 U.S. 694, 702 (1982); *California v. LaRue,* 409 U.S. 109, 112 n. 3 (1972); *United States v. Choate,* 276 F.2d 724, 728 (5th Cir. 1960). The Fifth Circuit, however, held that it had jurisdiction under § 3731 as a result of the defendants' limited waiver of double jeopardy resulting from the empaneling of a second jury.

A case earlier has come before this Court seeking review under the Court's supervisory power on the ground that an egregious jurisdictional error was committed below. Although certiorari was denied in that particular case, it does indicate that the Solicitor General of the United States, as well as three Justices of this Court, have deemed a jurisdictional error deserving of review on this ground. *Key v. Wise,* 454 U.S. 1103, 1105 (1981) (Brennan, J., joined by Marshall, J., and Blackman, J., dissenting). Thus, defendants respectfully request that the Court exercise its supervisory power in light of the serious violation below of settled federal practice regarding jurisdictional requirements.

III. THE DECISION BELOW IMPROPERLY HELD THAT APPELLATE JURISDICTION OF AN OTHERWISE NON-APPEALABLE INTERLOCUTORY SUPPRESSION ORDER MAY BE CONFERRED BY WAIVER.

Even if the Court elects not to use its supervisory power, the Fifth Circuit improperly held that the limited jeopardy waiver by the defendants waived the jurisdictional requirements of § 3731. Had the waiver been complete rather than limited, however, the parties still could not by choice vest jurisdiction in a court. *Ins. Corp. of Ireland v. Compagnie Des Bauxites, supra; California v. LaRue, supra*; *United States v. Choate, supra.*

Moreover, waiver of lack of jurisdiction, even if it were permitted by law, cannot occur here. The jeopardy waiver is applicable only if jurisdiction exists in the absence of the waiver. Defendants' waiver was *conditioned* on a showing that the government had "an appropriate vehicle to appeal." (Tr. 147) The government illogically claims it has an appropriate vehicle *as the result* of the waiver. But that approach puts the cart before the horse. This horse will pull only *if* there is an appropriate vehicle. An appropriate vehicle is not created out of thin air just because the horse stands waiting.

IV. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT OR WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Since enactment of 18 U.S.C. § 3731, approximately 63 federal cases have cited the provision in issue here. As it

stands today, the various appeals courts are issuing conflicting opinions on the meaning of the phrase "after the defendant has been put in jeopardy and before the verdict." Defendants respectfully urge that this Court rule on the questions presented to establish uniformity in the administration of justice.

This Court could, however, without addressing the full range of the controversy involving the express language of the statute and its legislative history, hold that the terms of the statute are to be applied as written.

In *Sanabria v. United States,* 437 U.S. 54, 61 n. 10 (1978), the Court refused to allow appeal of a suppression order, commenting in a footnote that:

> By its *plain terms,* moreover, this second paragraph of § 3731 does not authorize this appeal, since the ruling excluding evidence occurred *after the defendant had been put in jeopardy and before verdict.* (Emphasis added.)

The Court earlier stated that "If Congress had intended only pretrial suppression orders to be appealable, it would not have added the phrase 'and before the verdict or finding on an indictment or information' ". *United States v. Ceccolini,* 435 U.S. 268, 271 n.1. (1978). Again, therefore, the Court noted the significance of the particular words of the phrase in issue, observing that the appeal was "authorized by the *clear language* of 18 U.S.C. § 3731". *Id.* (Emphasis added.)

Thus far, the Court has applied the "plain terms" and the "clear language" of the phrase in controversy. Therefore, the Court has grounds for holding that it has provided sufficient guidance and that the plain terms of the statute should be applied as written. Thus, a reversal order without further hearing is appropriate.

V. THE DECISION BELOW IMPROPERLY HELD THAT APPELLATE JURISDICTION OF AN INTERLOCUTORY SUPPRESSION ORDER EXISTED EVEN THOUGH 18 U.S.C. § 3731 AND ITS LEGISLATIVE HISTORY CLEARLY PRECLUDE JURISDICTION.

As noted above, the jury had been sworn and empaneled prior to the suppression order in issue. Clearly the defendants had been put in jeopardy. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). The defendants' limited waiver of jeopardy did not waive the first jurisdictional requirement forbidding appeal of a motion made "after the defendant has been put in jeopardy." Therefore, the Appeals Court was without jurisdiction.

The government appeal also failed to satisfy the second jurisdictional requirement since the appeal was made from an order entered "before the verdict." The district court, which stated explicitly that the case was not dismissed, did not enter a verdict. Instead, in this case, the prosecution was temporarily terminated or suspended pending appeal of the suppression order by the choice of the government.

Congress, however, made *"no change"* with regard to the "present lack of provision for appeal from the granting of a motion to suppress evidence during the trial on the merits, when appeal would involve either the termination or suspension of the ongoing trial". Senate Report, at p. 13. (Emphasis added.) *See also id.* at 2, 3 and 18. Thus, the appeal in controversy was and is expressly forbidden both by the statutory language and the legislative history.

VI. THE DECISION BELOW IMPROPERLY HELD THAT EXCLUSION FROM EVIDENCE WAS NOT AVAILABLE TO CRIMINAL DEFENDANTS WHOSE PERSONAL BANKING RECORDS WERE ILLEGALLY OBTAINED AND USED IN VIOLATION OF THE RIGHT TO FINANCIAL PRIVACY ACT, 12 U.S.C. § 3420.

The Fifth Circuit held that the government violated the Right to Financial Privacy Act, 12 U.S.C. § 3420. The government failed to deliver the defendants' personal financial records to the grand jury even though the records were obtained from Abilene National Bank through the use of a grand jury subpoena, keeping the records instead for a period in excess of twenty (20) months and using them for its investigation.

The remedy provisions of the Act, 12 U.S.C. § 3417, were also held inapplicable; grand jury subpoenas are specifically excluded from the Act's coverage (save § 3420) pursuant to § 3413(i). The Court held that contempt, not suppression of the illegally obtained evidence, was the sole remedy for the government's violation.

The Financial Privacy Act clarifies that bank records are private. These are confidential records which are protected under "the customers' right of privacy". H. Rep. No. 1383, 95th Cong., 2d Sess. 33 (1978), U.S. Code Cong. & Admin. News 1978, p. 9305. Thus, these records are no longer "knowingly" exposed to the public, which was the justification in *United States v. Miller* for holding that the records were not protected by the Fourth Amendment. 425 U.S. 435, 441-42 (1976). Instead, customers now have a right or expectation of privacy.

The Right to Financial Privacy Act, in short, now provides a right for people to be "secure" in their papers such as

bank records, "against unreasonable searches and seizures", one of the protections granted under the Fourth Amendment. The Act has enabled people to "create a zone of privacy which government may not force him to surrender to his detriment". *See Griswold v. State of Connecticut,* 381 U.S. 479, 484 (1965). The fact that a specific right to this particular zone of privacy was not deemed by this Court in *Miller* to have been enumerated in the Constitution is not, under the Ninth Amendment, to be "construed to deny or disparage" the right to such privacy which was retained by the people, and which was, more specifically, recognized as a retained right by Congress in its enactment of the Financial Privacy Act.

We are dealing here with important constitutional considerations, not with some "technical violation" of an agency regulation. A citizen's right to privacy, here declared by Congress applicable to one's personal banking records, is fundamental to our system of government. *See Boyd v. United States,* 116 U.S. 616, 630 (1886); *Mapp v. Ohio,* 367 U.S. 643 (1961). Police conduct which invades that privacy in a manner inconsistent with the *processes* outlined by federal law to insure its protection authorizes the application of the exclusionary rule. *Id.*

Additionally, "one under investigation . . . is legally entitled to insist upon the observance of rules" promulgated by an executive or legislative body for his protection. *Bridges v. Wixon,* 326 U.S. 135, 152-53 (1945); *see United States v. Nixon,* 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974). When the government violates legislation which establishes a process for protecting individual rights or outlining their scope, this authorizes the use of the exclusionary rule as the only effective remedy. *Mallory v. United States,* 354 U.S. 449 (1957) (authorizing the exclusion of a confession obtained during a violation of

Rule 5(a) of the Federal Rules of Criminal Procedure, 1946). Government officials, no less than private citizens, are bound to obey the law. Those bounds were ignored in this case. The only real incentive for the law to be obeyed in the future is to exclude from evidence the fruits of its violation.

CONCLUSION

In the interests of assuring uniformity among the federal courts of appeals in the application of the second paragraph of 18 U.S.C. § 3731 of the Criminal Appeals Act, and 12 U.S.C. § 3420 of the Right to Financial Privacy Act, the Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon counsel for respondent, by depositing same in the United States Mail, postage prepaid, addressed to: Mr. William F. Alexander, Assistant United States Attorney, 16G28 United States Courthouse, 1100 Commerce Street, Dallas, Texas 75242; and Ms. Patty Merkamp Stemler, Appellate Section/Criminal Division, Department of Justice, Post Office Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ BEN L. KRAGE

Ben L. Krage

APPENDICES

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

James L. Kington and Don Earney,
Defendants-Appellees.

No. 85-1743.

United States Court of Appeals,
Fifth Circuit.

Oct. 3, 1986.

Defendants, former president and vice-president of defunct bank, were charged on numerous counts, including embezzlement, falsifying loan application, causing bank to fail to report currency transaction, and filing false income tax return. Prior to indictment, grand jury issued subpoena for relevant bank records. Defendants filed pretrial motion to suppress records on ground failure of grand jury to actually receive records violated Right to Financial Privacy Act. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, terminated trial and granted motion to suppress on condition defendants waived any claim of double jeopardy in event ruling was reversed on appeal, and Government appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) statute precluding government appeal after defendant was put in jeopardy and before verdict did not preclude Government's appeal of suppression order, and (2) suppression of records was not required.

Reversed and remanded.

1. Criminal Law — 189, 1024(1)

Statute governing appeals by government in criminal case places only two limitations on government's ability to

appeal suppression orders in criminal cases; first, no government appeal may lie if defendant's rights under double jeopardy clause would be violated should government prevail on appeal, and second, no government appeal may lie if appeal would interrupt ongoing trial. 18 U.S.C.A. § 3731; U.S. C.A. Const.Amend. 5.

2. Criminal Law — 1024(1)

Statute precluding government appeal after defendant was put in jeopardy and before verdict did not preclude Government's appeal on suppression order, where judge decided to terminate trial and grant defendants' motion to suppress on condition that defendants waived any claim of double jeopardy in event ruling was reversed on appeal, defendants expressly waived double jeopardy objections, Government did not initiate compromise which resulted in discharge of jury, and Government's appeal was entered after termination of trial upon discharge of jury. 18 U.S.C.A. § 3731; U.S.C.A. Const.Amend. 5.

3. Grand Jury — 36.4(1)

Under provision of Right to Financial Privacy Act governing grand jury subpoenas, it is not necessary for financial institutions to comply with subpoenas by bank officials themselves delivering requested records to grand jury; refusing to follow *In re Castiglione,* 587 F.Supp. 1210 (E.D. Cal.). Right to Financial Privacy Act of 1978, § 1120, 12 U.S.C.A. § 3420.

4. Criminal Law — 394.1(2)

Suppression of financial records obtained from bank was not warranted despite violation of grand jury subpoena provision of Right to Financial Privacy Act, where no constitutional violation was involved, and Congress did not intend suppression as remedy for violation. Right to Financial Privacy Act of 1978, § 1120, 12 U.S.C.A. § 3420.

5. Grand Jury — 36.4(1)

Under provision of Right to Financial Privacy Act, grand jury subpoena may be served, and financial records obtained, by any officer authorized by grand jury to do so; however, no examination of records may be made except for purposes of, and direction of, grand jury. Right to Financial Privacy Act of 1978, § 1120, 12 U.S.C.A. § 3420.

6. Grand Jury — 36.5(1)

Where there is breach of obligation of secrecy under grand jury subpoena provision of Right to Financial Privacy Act, court's power to punish for contempt is adequate sanction. Right to Financial Privacy Act of 1978, § 1120, 12 U.S.C.A. § 3420.

Patty Merkamp Stemler, Atty., Appellate Section, Crim. Div., Washington, D.C., Marvin Collins, U.S. Atty., William F. Alexander, Asst. U.S. Atty., Dallas, Tex., Kathleen A. Felton, Atty., Appellate Section, Crim. Div., Washington, D.C., for plaintiff-appellant.

Ben L. Krage, Kasmir, Willingham & Krage, Dallas, Tex., for Kington.

Jack Bryant, Tom M. Richards, Abilene, Tex., for Earney.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY and POLITZ, Circuit Judges, and ROBINSON*, District Judge.

REAVLEY, Circuit Judge:

The district court has suppressed bank records on the ground that the government violated the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422. The ruling was made after selection and swearing of the jury, the defendants having waived their right to object on double jeopardy grounds

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* District Judge of the Northern District of Texas, sitting by designation.

to a new trial. We hold that the government is entitled to appeal the court's ruling, and we reverse the ruling as an unwarranted sanction against the handling of the bank records.

Facts

Defendants were formerly president and vice president of now defunct Abilene National Bank. They were charged on numerous counts, including embezzlement, falsifying a loan application, causing a bank to fail to report a currency transaction over $10,000, and filing a false income tax return. Prior to indictment, a grand jury issued a subpoena for relevant bank records to Abilene National Bank. The bank delivered these records to FBI and IRS agents, not to the grand jury. The agents kept the records and prepared summaries of them for the grand jury.

Defendants filed a pretrial motion to suppress the records on the ground that failure of the grand jury to actually receive them violates the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422. The district court conducted a hearing on the motion and granted it, but only after the jury had been selected and sworn. After the hearing, the court discharged the jury, and three weeks later formally entered the suppression order from which the government appeals.

On appeal, the government argues that the bank records should not be suppressed. In addition to countering this contention, defendants Kington and Earney move to dismiss the appeal on the ground that this court lacks jurisdiction over the case.

Discussion

Jurisdiction

In arguing that this court lacks jurisdiction over the instant appeal, appellees rely on the wording of 18 U.S.C. § 3731, which provides:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the

> return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

It is settled law that "[i]n the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Serfass v. United States,* 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975). In the instant case, the jury was empaneled and sworn, but there was no verdict or finding on the indictment. Thus, argue the appellees, the United States appeals from a decision or order made "after the defendant has been put in jeopardy and before the verdict or finding," which is statutorily forbidden.

The interpretation of § 3731 need not be so mechanical. In *United States v. Harshaw,* 705 F.2d 317, 319 (8th Cir. 1983), the Eighth Circuit held that Congress "intended the phrase 'after a defendant is put in jeopardy and before a verdict or finding on an indictment or information' to represent the start and finish of an ongoing trial." What the statute forbids is the interruption of trial, an appeal by the United States from a suppression order during an ongoing trial. In the instant case, the government appeals from the district court's suppression order that was entered three weeks after the district court had ended the trial by discharging the jury.

[1] We agree with the *Harshaw* court, which stated:

> We conclude that § 3731 places only two limitations on the government's ability to appeal suppression orders in criminal cases. First, no government appeal may lie if the defendant's rights under the double jeopardy clause would be violated should the government prevail in its appeal. Second, no government appeal may lie if the appeal would interrupt an ongoing trial.

Id. at 319 (citations omitted). Neither of the two limitations apply in the instant case.

[2] The defendants have expressly waived double jeopardy objections to retrial should the government prevail in its appeal. But they claim that the second *Harshaw* limitation is applicable; they argue that the government's decision to appeal clearly interrupted an ongoing trial. Appellees would have us believe that the trial judge granted the suppression motion and then the United States interrupted the proceedings by bringing an appeal. This apparently was indeed the fact situation in *United States v. Payner*, 572 F.2d 144 (6th Cir. 1978), in which the court held that an appeal was forbidden under § 3731.

In the instant case, however, the judge empaneled the jury and then conducted a hearing on defendants' motion to suppress out of the presence of the jury. In considering the motion, the judge apparently decided to strike a compromise: he would terminate the trial and grant the motion on condition that the defendants waived any claim of double jeopardy in the event his ruling was reversed on appeal by the government. Although the judge and all parties contemplated that the government would appeal, the government did not initiate the compromise which resulted in the discharge of the jury. It was the judge who waited until after trial had commenced to rule on the government's pretrial motion, and it was the judge who discharged the jury after obtaining the waiver of jeopardy to permit the government's appeal.

The government appeals from an order entered after the termination of the trial, and it did not interrupt an ongoing trial in making its appeal. We conclude that the government did not appeal from a ruling made "after the defendant was put in jeopardy and before the verdict" within the meaning of § 3731, and the appeal is therefore authorized.

Suppression

I.

The district court based its decision to suppress the bank records on the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422. Section 3420 specifically applies to grand jury subpoenas, and it provides:

> Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury—
>
> (1) shall be returned and actually presented to the grand jury;
>
> (2) shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure;
>
> (3) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and
>
> (4) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

The subpoenaed bank records in the instant case were delivered to IRS and FBI agents, and were never "actually presented" to the grand jury. In support of its suppression ruling, the court cites *In re Castiglione*, 587 F.Supp. 1210 (E.D. Ca. 1984), which held that under § 3420 subpoenaed documents must be delivered by the bank or one of its officers or agents to the grand jury, and that it is improper for government agents to make the delivery. The district court indicates its belief that the holding in *Castiglione* supports its order to suppress the evidence. But in *Castiglione* the court in fact did not order suppression of the evidence as a remedy for the violation it perceived. Rather, the court there quashed "all existing subpoenas," and ordered that "[n]ew subpoenas may be issued by the grand jury . . . directing the custodian of records of such institutions to personally

appear and deliver such records into the Grand Jury's custody." *Castiglione* at 1215.

[3] More important, however, is our skepticism concerning the violation perceived to exist by *Castiglione*. The court there interprets the phrase 'actually presented to the grand jury,' appearing in § 3420(1), as meaning 'actually presented by a bank official.' But nothing in the language or legislative history of the statute dictates who is to do the presenting or delivering. The statute merely affirms that the grand jury must actually be presented with the documents; it does not state by whom. We hold, contra *Castiglione*, that it is not necessary for financial institutions to comply with subpoenas under § 3420 by bank officials themselves delivering the requested records.

II.

Appellees claim that suppression is appropriate in this case because the failure of the grand jury to receive the bank records, rather than mere summaries, violates their right to be indicted by a grand jury under the Fifth Amendment to the Constitution. They also claim a violation of their right to privacy under the Fourth Amendment. We reject both of these contentions.

A.

In *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), three internal revenue agents had been the only witnesses who appeared before the grand jury that delivered a tax fraud indictment against Costello. They delivered to the grand jury summaries of the documentary evidence. Costello "moved to dismiss the indictment on the ground that the only evidence before the grand jury was 'hearsay,'" and hence that it violates the Fifth Amendment requirement of presentment or indictment by a grand jury. *Id.* at 361, 76 S.Ct. at 407. The Court rejected this claim, however, holding that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." *Id.* at 362, 76 S.Ct. at 408.

Similarly, in *United States v. Brown,* 574 F.2d 1274 (5th Cir. 1978), we rejected a defendant's contention that it was improper for the grand jury to hear only an agent's oral summaries of evidence presented to a prior grand jury. "A defendant has no right to require that the Government present all available evidence at this proceeding." *Id.* at 1275. The holdings of *Costello* and *Brown* are dispositive of appellees' Fifth Amendment contention.

B.

Appellees also claim that suppression is justified because the government's failure to comply with § 3420(1) constitutes a violation of their Fourth Amendment right to be free from unreasonable searches and seizures.

In *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), the Court held that bank customers have no legitimate Fourth Amendment expectation of privacy in the records of their accounts maintained by banks. The Right to Financial Privacy Act "is a congressional response" to this holding, for "it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution. H.Rep. No. 1383, 95th Cong., 2nd Sess. 7, *reprinted in* 1978 U.S. Code Cong. & Ad.News 9273, 9306.

While it is evident that Congress has expanded individuals' right to privacy in bank records of their accounts, appellees are mistaken in their contention that the expansion is of constitutional dimensions. The rights created by Congress are statutory, not constitutional.

Thus, we must look to the Right to Financial Privacy Act itself to assess appellees' contentions. When we do so, however, we find that suppression of the evidence is nowhere mentioned as a remedy for violation of the Act. Congress was surely cognizant that in *Miller* the Court denied suppression as a remedy for a purported Fourth Amendment violation. Its failure to change the effect of *Miller* is strong evidence that Congress did not intend such a remedy. As the court said in *United States v. Frazin,* 780 F.2d 1461, 1466 (9th Cir. 1986), "[h]ad Congress intended to authorize a

suppression remedy, it surely would have included it among the remedies it expressly authorized."

[4] Since there was no constitutional violation here, and Congress apparently did not intend suppression as a remedy for violation of 18 U.S.C. § 3420, we conclude that suppression is inappropriate.[1]

The effect of § 3420 is to bring records subpoenaed by the grand jury under the secrecy safeguards and restrictions of grand jury proceedings generally. Representative Mattox, in proposing an amendment to the Right to Financial Privacy Act that eventually became § 3420, stated, "my amendment would stop the wholesale transfers of information between Government agency personnel by requiring that all transfers be limited to those which are allowed under rule 6(e) of the rules of criminal procedure." 124 Cong.Rec. 33829, 33842 (1978).

We therefore conclude that the government did violate § 3420(1) in failing to transfer control over the records to the grand jury. The question remains whether a penalty for this violation is available. Statutory penalties are provided by the Right to Financial Privacy Act, 12 U.S.C. §§ 3417-3418, but it appears that these sections are inapplicable "to any subpoena or court order issued in connection with proceedings before a grand jury." 12 U.S.C. § 3413(i).

Appellees insist that suppression is the only available remedy in this case, and that if the evidence is not suppressed this will encourage future violations of § 3420. Federal Rule of Criminal Procedure 6(e)(2) provides that "[a] knowing violation of Rule 6 may be punished as a contempt of court." If the effect of § 3420 is to bring records subpoenaed by the grand jury under the safeguards of grand jury

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[1] The Supreme Court has expressly rejected the idea that "a federal court should use its supervisory power to suppress evidence tainted by [even] gross illegalities that did not infringe defendant's constitutional rights." *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980).

proceedings generally, a violation of § 3420 should be subject to the same penalties as are other violations of Rule 6.

III.

[5, 6] To recapitulate, we hold:

1. Defendants have shown no Fourth Amendment or Fifth Amendment infringement.

2. Under § 3420 a grand jury subpoena may be served, and financial records obtained, by any officer authorized by the grand jury to do so. The officer takes custody of the records for the grand jury and subject to its control and direction. No examination of the records may be made except for the purposes of, and by direction of, the grand jury. They are thereafter to be maintained as sealed records of the grand jury pursuant to § 3420(2), (3) and (4) and to Rule 6(e) of the Federal Rules of Criminal Procedure.

3. A breach of the above stated restrictions does not warrant the suppression of the records. Where there is a breach of the obligation of secrecy, the court's power to punish for contempt is an adequate sanction and the one contemplated by Congress in its enactment of § 3420. It is unnecessary for us to decide here whether the civil penalties of § 3417 may be recoverable for abuses of § 3420.

REVERSED AND REMANDED.

APPENDIX B

U. S. District Court
Northern District of Texas
F I L E D
Nov. 15, 1985
Nancy Hall Doherty,
Clerk
By M.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CRIMINAL NO. CR-1-85-1

UNITED STATES OF AMERICA

V.

JAMES L. KINGTON AND
DON EARNEY

ORDER

Pursuant to a memorandum this date entered by the court in the above case, it is here ordered that the documents procured by the United States Government from the Abilene National Bank, presently the MBank of Abilene, in connection with the above case will not be presented to the jury in the trial of the above case.

The motion of the defendants to suppress such evidence is hereby granted.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 15th day of November, 1985.

/s/ HALBERT O. WOODWARD
HALBERT O. WOODWARD
CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

U. S. District Court
Northern District of Texas
F I L E D
Nov. 15, 1985
Nancy Hall Doherty,
Clerk
By M.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CRIMINAL NO. CR-1-85-1

UNITED STATES OF AMERICA

v.

JAMES L. KINGTON AND
DON EARNEY

MEMORANDUM OPINION

A grand jury in the Abilene Division of the Northern District of Texas has heretofore returned an indictment against the above-named defendants. The indictment charged the defendants with violating the laws of the United States of America with respect to certain banking transactions made by the defendants in their capacity as officers of the Abilene National Bank, in Abilene, Texas. Abilene National Bank has since become MBank of Abilene.

The defendants filed a joint motion to suppress the introduction into evidence of any documents secured by the United States Government pertaining to the defendants' personal financial transactions which were obtained from the Abilene National Bank. Both parties have filed briefs in support of and in opposition to the defendants' motion to suppress. A hearing on such motion was held on the 21st, 22nd, and 23rd days of October, 1985, with both defendants and counsel present.

At the commencement of the hearing on the motion to suppress, the parties entered into the following stipulation:

> "No. 4: That in response to the grand jury subpoenas, no officer or agent of MBank Abilene or Abilene National Bank actually made delivery of the subpoenaed documents to the grand jury, but instead, the documents were delivered to either FBI or IRS Special Agents. That with respect to the documents that were subpoenaed by the grand jury, they were summarized by the United States Government and the summaries either delivered to the grand jury. . . ."

Tr. 5. The subpoenaed documents were the defendants' personal financial records.

Pursuant to questioning by the court, the attorneys for the defendants and the attorney for the Government further stipulated that the Internal Revenue Service (hereafter IRS) and the Federal Bureau of Investigation (hereafter FBI) picked up the subpoenaed records, summarized them, and gave the summaries to the grand jury; however, the subpoenaed documents were never given to the grand jury. Furthermore, as a part of Stipulation 4 and upon inquiry by the court, it was agreed that these subpoenaed documents were never presented to the grand jury.

The defendants, as a basis for their motion to suppress, assert the following:

1. That although the grand jury issued a subpoena for the documents in question, they were never presented to the grand jury; only summaries of the documents prepared by the investigating officers were given to the grand jury.

2. That the subpoenaed documents were not delivered by the bank or any of its agents and employees, but that they were picked up by agents of the FBI and the IRS and taken to their offices for examination.

3. The defendants further contend that the agents of the United States of America had obtained information or seen documents in the possession of the bank which were the private finanical records of the defendants and that the

Government agents had possession of the information before any subpoenas were issued by the grand jury.

The defendants, upon the court's suggestion and consent of counsel, have waived any right to plead double jeopardy in the event that the Government appeals the ruling of this court on the motion to suppress. The defendants also agreed that if this decision were overturned on appeal, the new trial would not be subject to the plea of double jeopardy.

The Right to Financial Privacy Act (hereafter Financial Privacy Act), 12 U.S.C. §§ 3401 *et seq,* is controlling in this case and has the following special provision:

> "Section 3413(i): Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpena or court order issued in connection with proceedings before a grand jury."

12 U.S.C. § 3413(i) (1980).

Section 3415 concerns cost reimbursement and does not affect the matters considered here. Section 3420 specifically applies to grand jury subpoenas and forms the basis of this inquiry:

> "§ 3420. **Grand Jury Information**
> Financial records about a customer obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury —
> (1) shall be returned and actually presented to the grand jury; . . . ."

12 U.S.C. § 3420 (1980).

Stipulation 4, agreed to by the parties, and the court's inquiries concerning the stipulation establish that the subpoenaed documents obtained from the bank, concerning the personal financial records of the defendants, were delivered to Government agents, but were never actually presented to the grand jury. The evidence shows that the subpoenaed documents were maintained entirely in the offices of the IRS and the FBI, and never seen or examined by the

grand jury. Government agents examined the documents and prepared summaries which were in turn given to the grand jury in its regular sessions.

Under these circumstances, the grand jury, in returning an indictment, did so without any examination of the documents or any comparison of the documents with the summaries prepared by the Government for the purposes of clarifying or testing the accuracy of the summaries. In effect, the indictment was based on the summaries and not the subpoenaed documents.

Furthermore, it appears that the grand jury was denied its opportunity to perform its proper function: that is, to examine evidence and to determine, upon its examination of the evidence, whether or not an indictment should be returned. That was not done in this case and the court finds and concludes that the documents obtained from Abilene National Bank concerning the financial transactions of the defendants were never actually presented to the grand jury as required by Section 3420.

This court does not condemn or hold that the presentation of summaries made by Government agents to the grand jury was improper; however, the summaries alone are not sufficient for the grand jury to return an indictment. This is especially true where there is no opportunity for the grand jury to examine the documents upon which the summaries were based.

This is a direct violation of the requirements of the Financial Privacy Act, Section 3420, *supra,* and accordingly the court holds that the use of said subpoenaed documents in the trial of this case on its merits will not be permitted. Accordingly, defendants' motion to suppress is granted.

The defendants have cited the court to the case of *In re Castiglione,* 587 F. Supp. 1210 (E.D. Calif. 1984), where the Financial Privacy Act was applied to a similar fact situation. In *Castiglione,* the court held that it was improper for Government agents to receive subpoenaed financial records from a financial institution and to deliver them to the grand

jury. There the documents in issue had been subpoenaed by a grand jury. The court further held that the subpoenaed documents had to be delivered by the bank or one of its officers, agents, or employees to the grand jury. This holding applied only to the financial records of the movant in that case, and not to ordinary public or business records.

The *Castiglione* case comports with the facts in this case. As in *Castiglione,* Government agents actually picked up the subpoenaed documents from the Abilene National Bank, and delivered them to Government offices. In addition, an Assistant U.S. Attorney wrote a letter accompanying subsequent subpoenas to the bank directing Government agents to pick up and deliver the subpoenaed records to the grand jury. The only case that research has uncovered on this point is *In Re Castiglione.* Under its holding, these facts further support the order of this court to suppress the evidence.

If the documents or information leading to the documents had been furnished to the investigating officers before the issuance of a subpoena for production of the documents, this would constitute further grounds for suppressing the evidence so obtained. The evidence arguably shows that when the attorney for the bank and Government agents met, sometime between March 30 and April 7, 1983, there was an understanding that a subpoena would be issued. Tr. 53, 69, 74. The record shows, however, that the first subpoena issued after this conference was dated July 5, 1983, some two or three months after the conference. The attorney for the bank admitted at the hearing that it was quite possible that the bank had furnished some of this information or given access to some of the documents even before the July 5, 1983, subpoena had been issued. Tr. 68, 69, 72, 77, 78. He also admitted, and witnesses supported his admission, that neither he nor the other witnesses had any personal knowledge that any such information or documents had been furnished before the subpoena was issued. Tr. 50. The most believable evidence in this case is that the

bank did not furnish to the Government any of the documents or information until after the subpoena was issued. The evidence to the contrary shows that it was only "possible" such information was furnished; however, the witnesses called denied any personal or direct knowledge of any such premature disclosures.

However, the court finds and concludes that the Government's failure to actually present the subpoenaed documents in question to the grand jury is fatal to the Government's right to introduce these documents in evidence, and the motion to suppress will be granted.

The court does not rule on the question of whether or not the Government would be entitled, at this point, to request a grand jury to issue a new indictment on the subject matter contained in the first one.

An order will be entered accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 15th day of November, 1985.

/s/ HALBERT O. WOODWARD

HALBERT O. WOODWARD
CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX C

U.S. COURT OF APPEALS
FILED
NOV 12 1986
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1743

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JAMES L. KINGTON and DON EARNEY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10-03-86, 5 Cir., 198__, _____ F.2d _____)

(NOVEMBER 12, 1986)

Before REAVLEY and POLITZ, Circuit Judges and ROBINSON*, District Judge

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

---

* District Judge of the Northern District of Texas, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS M. REAVLEY
United States Circuit Judge

CLERK'S NOTE:
[Illegible] AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REHG-6

APPENDIX D

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

APPENDIX E

§ 3413. Exceptions

Disclosure pursuant to issuance of subpena or court order respecting grand jury proceeding

(i) Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpena or court order issued in connection with proceedings before a grand jury.

§ 3417. Civil penalties

Liability of agencies or departments of United States or financial institutions

(a) Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of —

(1) $100 without regard to the volume of records involved;

(2) any actual damages sustained by the customer as a result of the disclosure;

(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and

(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Disciplinary action for willful or intentional violation of chapter by agents or employees of department or agency

(b) Whenever the court determines that any agency or department of the United States has violated any provision of this chapter and the court finds that the circumstances surrounding the violation raise questions of whether an

officer or employee of the department or agency acted willfully or intentionally with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. The Office after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Office recommends.

Good faith defense

(c) Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this chapter in good-faith reliance upon a certificate by any Government authority shall not be liable to the customer for such disclosure.

Exclusive judicial remedies and sanctions

(d) The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter.

Pub.L. 95-630, Title XI, § 1117, Nov. 10, 1978, 92 Stat. 3708; 1978 Reorg.Plan No. 2, § 102, 43 F.R. 36037, 92 Stat. 3784.

§ 3420. Grand jury information

Financial records about a customer obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury —

(1) shall be returned and actually presented to the grand jury;

(2) shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure;

(3) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and

(4) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

Pub.L. 95-630, Title XI, § 1120, Nov. 10, 1978, 92 Stat. 3709.

APPENDIX F

(Tr. 4)

Abilene, Texas, October 21, 1985, 4:15 p.m.
Halbert O. Woodward, Presiding.
(Open Court, Jury Not Present.)

The Court: All right, gentlemen. Let's be seated. Are you ready to dictate any sort of stipulations into the record?

Mr. Krage: Yes, your honor, I believe we are. Mr. Alexander and I conferred.

The Court: All right. Let's hear it.

Mr. Krage: With Mr. Alexander's permission, with respect to defendant's motion to suppress, we have the following stipulations:

The Court: All right, sir.

Mr. Krage: Stipulation No. 1. The first grand jury subpoena, which requested any records dealing with the personal banking transactions of either Mr. Kington or Mr. Earney, was dated July 5, 1983, and was served July 6, 1983, and returnable July 12, 1983, to the grand jury.

Stipulation No. 2. That neither Mr. Kington nor Mr. Earney gave their permission to the United States Government or any of its agents or agencies to have copies of their records of their personal financial transactions at Abilene National Bank or MBank, Abilene.

Stipulation No. 3. That the United States Government nor any of its agencies or agents was ever given permission by

(Tr. 5)

Jedko Enterprises, a partnership, one of the partners of which was Mr. Kington, —

The Court: How do you spell that?

Mr. Krage: J-e-d-k-o.

The Court: J-e-d-c-o?

Mr. Krage: J-e-d-k-o.

The Court: Okay. That was "k-o," not "c-o." Okay.

Mr. Krage: No permission was given to the government or any of its agents or agencies by anyone authorized on behalf of Jedko for the government to have access to the personal financial records of Jedko.

The Court: Okay, sir.

Mr. Krage: No. 4. That in response to the grand jury subpoenas, no officer or agent of MBank Abilene or Abilene National Bank actually made delivery of the subpoenaed documents to the grand jury, but instead, the documents were delivered to either FBI agents or I.R.S. special agents. That with respect to the documents that were subpoenaed by the grand jury, they were summarized by the agents of the United States government and the summaries either delivered to the grand jury —

The Court: But the records were not?

Mr. Krage: I —

The Court: Is that the stipulation?

Mr. Alexander: It —

(Tr. 6)

The Court: The stipulation is that they went over there — to paraphrase it, the I.R.S., FBI, picked up these records, came back, summarized them, gave the summary to the grand jury and not the records?

Mr. Krage: I believe that —

The Court: Is that correct?

Mr. Alexander: Yes, sir. The records were here, physically present, for the grand jury —

The Court: Never given to the grand jury?

Mr. Alexander: Say again?

The Court: Never given to the grand jury?

Mr. Alexander: No sir.

The Court: All right, sir. Do you agree with these stipulations?

Mr. Alexander: Yes, sir.

The Court: Okay.

Mr. Krage: That is the extent of the stipulations, your honor.

The Court: All right. What else do you want to present to me?

Mr. Krage: We will be prepared, I believe, at the conclusion of the hearing on the motion to suppress for — to advise the court regarding our trial stipulation on the admission of documentary evidence. We can do it now.

The Court: That can be handled Wednesday when we —

(Tr. 21)

see if we can tie that down, because it looks like that is a personal financial record of one of the defendants in this case.

The Witness: Well, your honor, I don't mean to disagree with you, but it doesn't relate — never mentioned Don Earney at all.

The Court: Well, —

The Witness: Well, I —

The Court: I know it is not in their name, but I don't believe this law restricts anything just to their actual name. Of course, you are entitled to your view. I am not arguing with you, I just — that is the problem I have got facing me here.

The Witness: Yes, sir. I understand.

The Court: It says "Financial Records About a Customer." That is pretty broad. Let's look at that subpoena just so I can get that in my notes here.

Now Mr. Krage, would you quote for me, again, stipulation No. 5. I was writing my own hand notes, and —

Mr. Krage: Yes, sir, your honor, I will.

The Court: No. 5, what is it?

Mr. Krage: Stipulation No. 5 is that with respect to the documents that were subpoenaed by the grand jury, they were delivered to either FBI agents or agents of the Internal Revenue service.

(Tr. 22)

The Court: All right.

Mr. Krage: They were never delivered to the grand jury but were —

The Court: By anyone?

Mr. Krage: By anyone but were summarized and the summaries given to the grand jury by those persons called by the government in those proceedings, but the stipulation is that the records that were actually subpoenaed were never delivered by anyone to the grand jury.

The Court: And never actually presented to the grand jury?

Mr. Krage: No, your honor. That is the stipulation. They were never presented to the grand jury.

The Court: Well, we can get this subpoena out later. Let's go on with the other —

Mr. Krage: Your honor, I can help the court and possibly counsel. In the government's response to defendant's motion to suppress evidence, they have attached a list of all of their subpoenas. There are only two subpoenas that were issued for a grand jury prior to July 12, 1983, and that was a subpoena issued to Abilene Bank on — for a grand jury date of May 16, 1983, and it was for the records requested were for Helter Skelter Corporation, Big Tex Crude, H. L. Shaw, for 1-1-81 to 8-9-82.

The Court: All right. Now, you said there was a

(Tr. 141)

here? May he take them to the I.R.S. office in Dallas where they have got a fast xerox machine?

So I think that paragraph — I do not have a case to cite you, but —

The Court: There are just not any cases directly in point. We all agree on that.

Mr. Alexander: Yes, sir.

The Court: Except the California case, of course.

Mr. Alexander: I submit to you that the law does not expect a person or an agency to do a stupid, useless, or foolish thing.

The Court: Just don't let the grand jury see it. It is none of their business, anyway?

Mr. Alexander: And if they want to see the rest of them, let them ask for them, if they understand that it is — that it is their forum.

The Court: Well, I was speaking facetiously. I think a grand jury is all powerful over the I.R.S., the FBI, and everything else and —

Mr. Alexander: Well, your honor, that — this method of grand jury —

The Court: I am not saying — I am not implying and have no reason to believe that Mr. Copeland or anybody else deliberately or intentionally or did any — hide anything from the grand jury. But you see the danger in things like

(Tr. 142)

this. Who becomes the grand jury? Who becomes the grand jury? The I.R.S. and the FBI. They are the grand jury because they are the only ones that have seen these documents, and it is just a facade when we go to the grand jury. That is the purpose of this statute, is to keep it in the hands of the grand jury, one of the purposes. That is the thing that is bothering me here.

Mr. Alexander: Well, your honor, I can only —

The Court: The agents we have down in this part of the country, I have never had any indication of anything wrongdoing, sleight of hand or anything, but Congress must have thought — they must have thought that there was some danger that the grand jury would be hoodwinked by someone, and if they didn't get to see the evidence or the documents —

Mr. Alexander: The restraint on the agents is, first of all, they took an oath to do —

The Court: They what?

Mr. Alexander: They took an oath to perform a job with the penalties attached to that oath. The tests of whether the information brought to the grand jury is true and accurate is on the trial.

Suppose —

The Court: What is the use of having a grand jury if you are not going to show them the evidence?

Mr. Alexander: Well, isn't a summary sufficient?

(Tr. 145)

Mr. Alexander: The movant of this motion to suppress has made allegations which they didn't prove.

The Court: You mean — anything in particular you are referring to, or what we have already gone over?

Mr. Alexander: What we have already gone over.

The Court: All right, sir.

Mr. Alexander: And I just wish I could give you a case on this numbered paragraph — I don't have it. I tell you what I think is fair and reasonable and what should be expected and leave it to the court.

The Court: Mr. Alexander, I wish I were not on the cutting edge, too. I wish I had a case.

Now, I discussed with you gentlemen the proposition of the dilemma I find myself on double jeopardy. In the event — I am not making a ruling here, but I am leaning that way — that I were to suppress this evidence, would the defendants be in a position to waive any claim of double jeopardy in case my ruling were reversed?

Mr. Alexander: May it please the court, may I address something? I direct your attention to Title 18, 6373.1, which provides that no order of suppression or dismissal can be appealed by the government if jeopardy has attached or if there is a question of double jeopardy.

The Court: Well, that is the reason I am trying to

(Tr. 146)

get rid of that question.

Mr. Alexander: Yes, sir.

The Court: Because I think — listen, I think the government ought to have a right of appeal if I go against you, and I think they ought to have it if I go with you. There is no question. I want to be sure that this is an appealable order, and that is the reason I am asking them if they are going to waive their right to claim—

Mr. Alexander: I don't think they can even waive that right to jeopardy.

The Court: You can waive any right you have got under the Constitution. Right to an attorney, right to a trial, right to confront the witnesses. Why can't you waive double jeopardy?

Mr. Alexander: Well, I used to think that you could, your honor, but —

The Court: Well, I hold that you can waive it. But now what is the position of the — Mr. Krage, who do you speak for?

Mr. Krage: I speak for Mr. — the defendant, Mr. James L. Kington, your honor. I can tell you that the defendant, Mr. Kington. is willing to, in response to your — to a possible order that would be favorable on the motion, that if such an order is made by the court suppressing evidence in this case or, alternatively, dismissing this

(Tr. 147)

case because of abuse of grand jury process, that Mr. Kington will waive his double jeopardy claim if the government has an appropriate vehicle to appeal, they do decide to appeal, and this waiver is only if they do appeal, not for reindictment, your honor, only if they do appeal this ruling, and I want to make that clear.

The Court: Well, and the appeal — my ruling would have to be reversed, of course.

Mr. Krage: Of course. If it is reversed and remanded for trial, we waive the issue of double jeopardy as a result of the second trial to the extent that any jeopardy may have already attached from the impaneling of this jury, and this waiver is made knowingly, intelligently, and freely.

The Court: Mr. Kington, do you agree with this?

Mr. Kington: Yes, your honor.

The Court: Counsel on behalf plaintiff Earney?

Mr. Richards: On behalf of Mr. Earney, please the court, I would state to the court that I have discussed this particular issue with Mr. Earney concerning double jeopardy and have explained that to him, that I would concur in the stipulation of the co-counsel, Mr. Krage, and that we would waive double jeopardy in this particular situation if the court so — would that be your testimony Mr. Earney?

Mr. Earney: Yes, sir.

The Court: Mr. Earney, do you agree with the

(Tr. 148)

waiver?

Mr. Earney: Yes, sir.

The Court: I don't mean to imply that double jeopardy will attach. I am not sure whether it does or not. The jury was sworn, and there are some cases holding that is when jeopardy attaches.

Mr. Alexander: They do.

The Court: But now my understanding is, clear understanding is, that neither of these defendants will claim that they can't be tried in this case in the event that I rule suppressing the evidence and an appellate court reverses that ruling.

Mr. Richards: Yes, sir.

Mr. Krage: Yes, your honor.

Mr. Alexander: Now, your honor, the government is not satisfied with the record on that, because they might discharge these lawyers and get lawyers in who would claim that they did not knowingly and understandably waive whatever right they had.

The Court: I don't know how we can explain it. Both of them are right here and adopted the statements of their lawyers, and when I went a little further into it, they agreed with me.

All right. Gentlemen, No. 1, I am going to issue a formal order later, but at this time, I am ruling, and it

(Tr. 149)

will be a final ruling, but the time for appeal will not start until I enter my formal order, that all of the documents obtained from the Abilene National Bank or M-Bank with or without a subpoena and concerning the financial records of the two defendants in this case will not be admitted into evidence, and the motion to suppress that evidence is granted.

Principally, I do so on the grounds that that, to me, the provisions of Section 3420 of Title 12 are about as clear language as I have ever seen in a statute of Congress. And it says that they shall be actually presented, and the stipulation No. 4 in this case is that they were not delivered to the grand jury, but obtained by the law enforcement authorities and held by them for summary purposes and only the summary was given to the grand jury.

Now, here is my concern: You can't try anybody for a felony unless there has been a proper grand jury indictment. And when a grand jury returns an indictment and has no primary evidence but only has somebody's opinion of what the primary evidence is, they are not the grand jury. They are not the grand jury. The — this makes the law enforcement agencies the grand jury, and that is just against our system, it is just fundamental.

Now, that applies to all of these documents, because none of them were actually presented to the grand jury. I will

(Tr. 150)

probably go on and discuss — that is my main point right there. But there may be something about the delivery. To me, that is stretching the law, but I may hold that way. And

I am going to have to review the evidence pretty carefully before I can hold one way or another that information was in the possession of the agencies prior to that.

Now, in view of that, I presume the government would rather appeal this than try to go forward with the trial next Monday, if all this is suppressed, am I correct?

Mr. Alexander: Yes, your honor, it would be pointless to go into —

The Court: We need an appellate —

Mr. Alexander: Yes, sir.

The Court: We need an appellate review. This case is not dismissed. I am not dismissing the case. I am merely suppressing the evidence. You can go to the appellate courts, and I am happy we are going to get a resolution of this matter one way or another. But that will be my holding. You will not, of course, be expected to have your time for appeal to run until I file the formal order.

Mr. Alexander: Yes, sir.

The Court: But I thought I would let you know. You may have one or two witnesses that you want to excuse next Monday, so — kind of a hard decision. It is — it is an interesting point.

(Tr. 151)

Mr. Alexander: Your honor, may I inquire as to one thing?

The Court: Yes, sir.

Mr. Alexander: We have seventy some witnesses under subpoena. May we have an order that they remain under subpoena and can be notified for their next appearance?

The Court: If you will prepare the order, I will sign it.

Mr. Alexander: Yes, sir.

The Court: I would think it would be prudent not only to have that order, but when a time is set for trial, if it is set, that you resubpoena them just to make certain, but that order you asked for will be entered by the court.

Mr. Krage: Your honor, —

The Court: It excuses them until such other time — Mr. Krage?

Mr. Krage: Will the defendants remain on their personal bonds?

The Court: Oh, yes, sir. Yes, sir. Yes.

Well, you all have given me a good workout. And it has been a long week, even though it is Wednesday, but I thank you for the research that each of you did, and you tried to assist the court, and you did assist me. But I will enter the order as indicated here.

And, Martha, you can go call those jurors and tell them that they are excused until further notice. We may have

(Tr. 152)

another jury term.

Thank you, gentlemen. You are excused.

Mr. Krage: Thank you, your honor.

(Recess.)